IN THE HIGH COURT OF KERALA AT ERNAKULAM

PRESENT :

THE HONOURABLE MR. JUSTICE V.RAMKUMAR

MONDAY, THE 5TH FEBRUARY 2007 / 16TH MAGHA 1928

CRL.A.No. 1700 of 2003()

CC.701/2000 of JUDL.MAGISTRATE OF FIRST CLASS-II, ALUVA

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APPELLANT: COMPLAINANT:

VARGHESE PAUL,AGED 42 YEARS,
S/O.PAUL GEORGE,HOUSE NO.1/678,
POND VILLAGE,FORT KOCHI,
PARTNER IN GREENLAND ENTERPRISES,
NORTH KALAMASSERY.

BY ADV. SRI.V.K.GOPALAKRISHNA PILLAI
SRI.GOPAKUMAR.G.

RESPONDENTS: ACCUSED & STATE:

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1. SATHIYAN,S/O.PONNU SWAMY,
PONNALAYAM,MUTTOM,
THAIKKATTUKARA P.O.,
ALUVA.

2. STATE OF KERALA,REP.BY PUBLIC PROSECUTOR
HIGH COURT OF KERALA AT ERNAKULAM.

BY ADV. SRI.C.D.JOHNY
SRI.P.SHAIJAN JOSEPH
PUBLIC PROSECUTOR SRI.K.S. SIVAKUMAR

THIS CRIMINAL APPEAL HAVING BEEN FINALLY HEARD ON 25-01-2007, THE COURT ON 05/02/2007 DELIVERED THE FOLLOWING:

V. RAMKUMAR, J.

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Crl. Appeal No. 1700 of 2003

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Dated, this the 5th day of February 2007

JUDGMENT

The accused in C.C. No. 701 of 2000 on the file of J.F.C.M. - II, Aluva for an offence punishable under Sec. 138 of the Negotiable Instruments Act, 1881 (hereinafter referred to as "The Act" for short) challenges the conviction entered and the sentence passed against him by the said court for the said offence.

2. The above case arose out of a private complaint filed by the first respondent herein to the following effect:-

On 20-11-2989 the accused borrowed a sum of Rs. 60,000/- from the complainant agreeing to re-pay the said amount within two months. On repeated demands for the amount the accused issued Ext.P1 cheque dated 10-4-2000 drawn on the Kalamassery Branch of the Federal Bank. When the cheque was presented for collection the same was dishonoured for want of sufficient funds in the account of the accused A statutory notice was issued to the accused calling upon him to pay the amount

due under the cheque. Even though the accused received the notice on 15-5-2000, he neither paid the amount nor sent a reply. The accused has thereby committed an offence punishable under Sec. 138 of the Negotiable Instruments Act.

3. On the accused pleading not guilty to the substance of accusation read over and explained to him, the complainant was called upon to adduce evidence in support of his case. The complainant examined himself as P.W.1 and got marked 7 documents as Exts.P1 to P7.

4. After the close of the prosecution evidence the accused was questioned under Sec. 313 (1)(b) Cr.P.C. with regard to the incriminating circumstances appearing against him in the evidence for the prosecution. He denied those circumstances and maintained his innocence. He stated that Ext.P1 cheque was issued as a security when he auctioned the chitty conducted by the complainant, that the entire chitty instalments had been repaid by him and that the complainant evaded all earnest attempts made by the accused to get back the cheque. To substantiate

the said defence the accused examined himself as D.W.1 and he also examined an independent witness as D.W.2.

5. The learned magistrate, after trial, as per judgment dated 17-2-2003 acquitted the first accused after holding that Ext.P1 cheque was not issued in discharge of a debt or liability but was issued by way of security. It is the said judgment which is assailed in this appeal by the complainant after obtaining leave to file the same.

6. The only point which arises for consideration is as to whether the appellant/complainant has succeeded in proving that the respondent/accused has committed an offence punishable under Section 138 of the Act.

THE POINT:

7. I heard the learned counsel for the appellant and the learned counsel for the respondent.

8. Assailing the judgment under appeal, the appellant's counsel made the following submissions before me :-

The complainant examined as P{.W.1 has admitted that he was not

in the habit of insisting on security while any chitty subscriber auctioned the chitty. If the accused had repaid all the instalments, then as a reasonable and prudent man he would have taken the cheque back from the complainant. The explanation offered by the accused for not taking back the cheque is not at all convincing. According to the accused examined as D.W.1, P.W.1 the complainant told him that the cheque was misplaced when the office was shifted. But D.W.2 would say that P.W.1 told the accused that the cheque was with his legal adviser. D.W.2 was not present when accused went to P.W.1 to collect the amount. It is unlikely that the accused would have subsequently handed over a blank cheque to P.W.1 as contended by him. If as a matter of fact Ext.P1 cheque was issued as a security for the due payment of the instalments, the collection of the amount and the handing over of the security would have been a simultaneous transaction. DWs 1 and 2 have not rebutted the presumption under Sec. 139 of the Act. D.W.1 has been giving different stories on all the three occasions when he allegedly approached P.W.1 for return of the cheque. D.W.2 does not

corroborate D.W.1.

9. I am afraid that I cannot agree with the above submissions. Even though P.W.1 would say from the witness box that it was a personal loan, in the complaint he has described himself as a partner of the kuri firm. Even P.W.1 confessed during his cross-examination that the accused was having transaction with the firm only. P.W.1 also admitted that some subscribers used to bring their cheque books and issued cheques while auctioning the chitty. The evidence on record is to the effect that accused handed over the cheque at the time of auctioning the chitty. Thereafter, he remitted the entire amount. When the accused demanded the cheque back P.W.1 told him that the cheque was misplaced in his office. The accused has also credibly stated that on receipt of the statutory notice when he met P.W.1 the latter told him that it was sent by mistake and that no action would be taken pursuant to it. P.W. 1 has also admitted that the signature in Ext.P1 cheque is of a particular ink and the other writings including the date therein are in different ink. This also probabilises the defence

version that at the time of auctioning the chitty, P.W.1 took from the accused a blank cheque by way of security. Apart from suggesting to P.W.1 the above defence, the accused stepped into the witness box and examined himself as D.W.1 to substantiate his version. He also examined D.W.2 who has given corroboration to the case of the accused. The trial Magistrate who had the unique advantage of seeing the witnesses and assessing their credibility was not inclined to accept the version of the complainant examined as P.W.1. The learned Magistrate fully believed the testimony of DWs 1 and 2. In the absence of any infirmity in the appreciation of evidence by the trial court this court sitting in appeal will be loath to take a different view. (Vide.State of Kerala v. Cheriyan - 1997 (2) KLT 196; Shivaji v. State of Maharashtra - AIR 1973 SC 2622 and Madhusudan Das v. Narayani Bai - AIR 1983 S.C. 113).). The accused has thus rebutted the presumption under Sec. 139 of the Act. The finding recorded by the trial court that the prosecution has not succeeded in proving beyond reasonable doubt that the he cheque was issued by the accused to the complainant in discharge of an amount

legally due to him is, on the evidence, perfectly justified. I fully endorse the conclusion reached by the Magistrate.

The result of the forgoing discussion is that this appeal is without merit and is accordingly dismissed confirming the judgment passed by the trial court acquitting the accused of the offence punishable under Sec. 138 of the Act.

V. RAMKUMAR,
(JUDGE)

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V. RAMKUMAR, J.

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Crl. Appeal No. 1700 of 2003

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Dated, this the
day of 2006

JUDGMENT